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DEC 13 1968

JOHN F. LEWIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 413

CLIFTON A. PEARCE,

Respondent,

VS.

STATE OF NORTH CAROLINA,

R. L. TURNER, Warden,

Petitioners.

Petition for a Writ of Certiorari to the United States

Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE STATE OF KANSAS

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AMICUS CURIAE BRIEF OF THE STATE OF KANSAS

Amicus Curiae has an interest in this case insofar as it deals with the constitutionality of the action of a state criminal trial court imposing a greater sentence following conviction in a re-trial or in a resentencing procedure than was originally imposed. The Attorney General represents the State of Kansas as the chief law enforcement officer responsible for the administration of criminal justice and as such is interested in any decision limiting increased punishment on re-trial and resentencing.

ARGUMENT AND AUTHORITIES

Introduction

This case presents the recurring problem of the sentencing procedure that may constitutionally be employed following a second trial or sentencing procedure against a criminal defendant. The precise question involved is whether or not a state court can, within the bounds of the federal constitution, impose a greater sentence than was originally imposed upon a criminal defendant subsequent to the time the original sentence has been vacated or set aside. The Fourth Circuit Court of Appeals determined in this case that there was a Federal Constitutional limitation preventing the imposition of greater punishment in the second sentencing procedure on the authority of *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967).

Respondent was sentenced to not less than twelve nor more than fifteen years in his original criminal trial. Following successful post-conviction relief, and a second jury conviction on the same charge, he was sentenced to a term of imprisonment that, taking into account time already served, amounted to a flat fifteen year sentence.

In Kansas, similar situations involving possible greater sentence at re-trial or resentencing that would be affected by a decision on the merits of the question presented herein arise in three separate ways: (1) greater punishment following the re-trial on an identical charge following successful direct appeal or post conviction relief initiated by the criminal defendant; (2) greater punishment imposed subsequent to a trial following post conviction relief setting aside a plea of guilty; and (3) greater punishment imposed during resentencing following a successful post conviction attack solely on the validity of the

sentence originally imposed. The increasing frequency with which such situations occur impels us to invite this Court's attention to problems with which we are faced which are significantly related to the problem of this case.

I. Greater Sentencing on Resentencing Is Allowed by a Majority of the Courts That Have Considered the Problem.

The latest compilation of state authority on the subject indicates a majority of the states would allow greater sentence on resentencing or re-trial. See, *Annotation, Propriety of Increased Punishment on New Trial for Same Offense*, 12 A.L.R. 3rd 978, 979-980. A survey of the latest federal authorities of which we are aware indicates a wide spectrum of decision ranging from complete prohibition of greater punishment on re-trial [*Pearce v. North Carolina*, F.2d (4th Cir. 1968); *Patton v. North Carolina*, *supra*] to conditional use of greater punishment in re-trial where justified by an evaluation of new resentencing or probation report [*United States v. White*, 382 F.2d 445, 448 (7th Cir. 1967)] or new resentencing report adding events subsequent to the original criminal trial as justification for an increased sentence [*Marano v. United States*, 374 F.2d 583, 585 (1st Cir. 1967)], to almost complete allowance of greater sentencing in the absence of clear and proven violations of constitutional standards [*United States ex rel. Starner v. Russell*, 378 F.2d 808, 811-812 (3rd Cir. 1967)]. It is the position of the State of Kansas that the latter view should control in situations like those described previously. In stating this position, we want to make it absolutely clear that we believe greater punishment on re-trial or resentencing is not constitutionally permissible, both by federal as well as state constitutions, where it is used to punish the criminal de-

fendant for successfully attacking a conviction. However, we are also fully convinced that a blanket prohibition upon greater punishment in resentencing is not only unjustified but would seriously impair the function of the state trial judge as a sentencing judge.

II. The Nature of the Sentencing Procedure Justifies Greater Sentencing on Resentencing.

It is significant that the phase of the criminal proceeding which is the subject of this lawsuit occurs after a determination of guilt has already been made, whether by trial or plea of guilty. At the time the state trial judge pronounces sentence, the presumption that a man is innocent until proven guilty has been dispelled by trial or admission. The constitutional rules, whose purposes are to create an atmosphere of fairness and equal opportunity to defend the presumption of innocence have all been utilized, if necessary. As a matter of fact, the cases in which the problem of resentencing or re-trial appears, attest to the successful employment of these very constitutional standards. But regardless of the reason for which resentencing is necessary, the fact remains that at the time the new sentence is pronounced there is no question but that the criminal defendant is guilty.

As a result, this Court, among many others has noted upon more than one occasion that the constitutional protections that exist until the time the presumption of innocence is rebutted by conviction and judgment, are relaxed for the purpose of imposing the proper punishment in each individual case. See e.g., *Williams v. Oklahoma*, 358 U.S. 576, 584 (1959); *Williams v. New York*, 337 U.S. 241, 248 (1949); *United States ex rel. Collins v. Claudy*, 204 F.2d 624, 628 (3rd Cir. 1953).

It was this distinction separating the sentencing portion of the criminal procedure from the guilt determining portion that has lent support to individualization of the sentencing procedure. Present penology theories support the proposition that each individual criminal defendant, subsequent to the time his guilt has been determined, should be punished as his individual case warrants.

"A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

"...The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was automatic and commonplace result of convictions—even for offenses today deemed trivial."

* * *

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes."

* * *

"The considerations we have set out admonish us against treating the due-process clause as a uniform

command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence . . . In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court. The due-process clause should not be treated as device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." *Williams v. New York*, *supra*, pp. 248-249, 250.

The state or federal trial judge must, in discharging his duty to impose the proper sentence, consider all of the mitigating and aggravating circumstances involved in the crime. *Williams v. Oklahoma*, *supra*, at p. 586. Trial judges are counseled by both statutory authority and professional practice expertise to individualize their sentences. See *State Trial Judge's Book*, Chapter 20, Judgment and Sentencing in Criminal Cases, especially pages 236-244.¹

Historically, the subject of punishment in criminal law is one that has been reserved for the legislative body, and for local or state administration. See e.g., *Bell v. United States*, 349 U.S. 81, 82-83 (1955). The 14th Amendment was not designed to interfere with the power of the

1.—Although there is much concern about using the same criteria in each sentencing procedure, there is implicit in such an approach of individualized treatment for each criminal. See e.g., Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69-71; *Standards Relating to Sentencing Alternatives and Procedures*, 4, 10-12, 54, 252-256 (American Bar Association 1967); Levin, *Toward a More Enlightened Sentencing Procedure*, 45 Nebraska L. Rev. 499 (1966).

state to protect the lives, liberty and property of its citizens. *Hodgson v. Vermont*, 168 U.S. 262, 273 (1897).

Unless we are to change the foregoing philosophies it would appear, without more, that the result wrought by the *Patton* rule has deprived the sentencing procedure of that unique flexibility and individualization which has been so widely hailed as an important advancement in the administration of criminal justice. Certainly, it would be possible to establish a criminal procedure for sentencing that would allow no variation from individual to individual. If that were true there would be no problem presented by greater punishment at re-trial. However, we are not willing to concede that the heretofore thought wise decisions of those responsible for the administration of criminal justice establishing a flexible and individualistic system of enforcement, should suddenly be thrown to the wind by concluding, in effect, that such flexibility and individualism is precluded by the Federal Constitution in cases such as these. We reiterate, however, that the desired flexibility and individualization must not be a tool to penalize a successful criminal appellant or post conviction movant.

It is respectfully submitted that in any case involving resentencing the state trial judge should be free to exercise this flexibility and individualization of punishment even to the extent of imposing, where justified a greater sentence upon resentencing. See, *United States v. White*, 382 F.2d 445, 448 (7th Cir. 1967); *U. S. ex rel. Starner v. Russell*, 378 F.2d 808, 811-812 (3rd Cir. 1967); *Marano v. United States*, 374 F.2d 583, 585 (1st Cir. 1967); *Short v. United States*, 344 F.2d 550, 552 (D.C. Cir. 1965). Cf. *Newman v. Rodriguez*, 375 F.2d 712, 714 (10th Cir. 1967) (holding that failure to credit time served on original sentence does not violate due process).

We certainly have more faith in the state trial judge than to attribute to him the motive of penalizing the successful criminal appellant or movant whenever a greater sentence on resentencing has been imposed.

Interestingly, in a related area, credit for time served prior to trial and/or prior to sentencing while awaiting the presentence report could be denied in the discretion of the federal trial judge in the absence of statutory direction. *Amato v. United States*, 374 F.2d 36, 36 (3rd Cir. 1967); *United States v. Deafon*, 264 F.2d 820 822 (6th Cir. 1967); *Williams v. United States*, 335 F.2d 290, 291 (D.C. Cir. 1967); *Epperson v. Anderson*, 326 F.2d 665 (D.C. Cir. 1963). The fact that the criminal defendant in such cases could, as a result of the discretionary sentencing orders of the judge, serve more time than was actually contained in the final sentence, was "not sufficiently invidious to reach constitutional proportions." *Sobell v. Attorney General of the United States*, 400 F.2d 986, 990 (3rd Cir. 1968). While the factual situation in these cases is not identical to that here, the practical result may be. And yet, in such situations, the denial of credit in the absence of statutory directives, is held to be a matter for the proper discretion of the sentencing judge.

The "proper" sentence should be imposed in each case, regardless of whether it is in an original trial and sentence, or re-trial and resentence, and should likewise be solely a matter for the proper discretion of the trial judge.

III. Analysis of the Theories Advanced to Prohibit Greater Sentencing on Resentencing.

Needless to say, if a greater sentence is absolutely prohibited by the Federal Constitution, the foregoing remarks are of no import. However, we feel that an analysis of the justifications supporting the conclusion that

greater punishment is constitutionally impermissible leaves a great deal of doubt about their validity. We therefore consider the three constitutional objections to greater punishment on re-trial, (a) double jeopardy, (b) due process and (c) equal protection.

(a) Double Jeopardy.

It is suggested that the double jeopardy prohibition of the Fifth Amendment, if extended through the Fourteenth Amendment to the states—a conclusion not currently valid²—prohibits “multiple punishment.” *Patton v. North Carolina, supra*, 643-646. We think it clear that greater punishment on re-trial is not prohibited by the double jeopardy clause. Obviously, fact situations such as the instant case do not present double jeopardy claims for re-prosecution for the same offense following acquittal, re-prosecution for the same offense following conviction, or re-prosecution for a greater offense following conviction of a lesser included offense (the so-called implied acquittal doctrine of *Green v. United States, supra*, note 2).

As this Court has noted on several prior occasions, the constitutional prohibition against double jeopardy was designed to protect the individual from “being subjected to the hazards of trial and possible conviction more than once for an alleged offense.” *Green v. United States, supra*, at p. 187.

In any event, as long as the sentence ultimately imposed upon the criminal defendant is not in excess of the

2. Even though double jeopardy supports the doctrine of implied acquittal based upon conviction of a lesser included offense, *Green v. United States*, 355 U.S. 184, 193-194, 198 (1957), the federal rule is not applicable to the states through the Fourteenth Amendment. See, *Palko v. Connecticut*, 302 U.S. 319 (1937).

statutory maximum, that criminal defendant has not been subject to multiple punishment by greater sentence and re-trial. Certainly, the fact that the criminal defendant was on two occasions sentenced does not in itself mean he was subject to multiple punishment. If it did, there would be no problem presented by this case; re-trial or resentencing would be completely prohibited. Multiple punishment must mean punished more than once for the same offense. Until the time that a criminal defendant has been validly sentenced, he has not, in the first instance, been punished. A later sentence, even if it is greater, as long as it is within the statutory maximum, can therefore by definition not be multiple punishment.

Concerning trials, it is clear that re-prosecution of an offense resulting in conviction which is subsequently set aside does not violate double jeopardy. *United States v. Tateo*, 377 U.S. 463, 465 (1964); *United States v. Ewell*, 383 U.S. 116, 121 (1966); *Foreman v. United States*, 361 U.S. 416, 425 (1960); *Trono v. United States*, 199 U.S. 521, 531, 533 (1905); *United States v. Ball*, 163 U.S. 662, 672 (1896). Further, upon re-trial the prosecution is not limited solely to re-presenting the evidence presented at the first trial. *United States v. Shotwell Manufacturing Co.*, 355 U.S. 233, 243 (1957).

The reason for these rules is well expressed in *United States v. Tateo, supra*.

"Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at

least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pre-trial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of re-trial serves defendants' rights as well as society's interest. The underlying purpose of permitting re-trial is as much furthered by application of the rule to this case as it has been in cases previously decided." l.c. 466.

Society has a similar interest in imposing the "proper" sentence upon each guilty criminal defendant. Prohibition of greater sentence upon re-trial resentence would contradict that interest.

(b) Due Process.

A second constitutional objection to greater sentence in re-trial and resentencing is that imposition of the greater sentence violates the due process requirements of either the Fifth or Fourteenth Amendments. See *Patton v. North Carolina*, *supra*, pp. 638-641.

The limitation that is placed upon the power of the states to prescribe penalties for violations of their laws is not precisely definable, but has always allowed the states wide latitude of discretion. Their enactments transcend this limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable. *St. Louis I. M. S. R. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). The Fourteenth Amendment does not limit the powers of a state in dealing with a crime committed within its borders or with a punishment regarding that crime as long as fair and impartial justice under the law is granted to the criminal defendant. *Ughbanks v. Armstrong*, 208 U.S.

481, 487 (1908). The state, for example, may legitimately within the confines of the due process clause provide for more severe penalties for repeating offenders [*Oyler v. Boles*, 368 U.S. 448, 452 (1962); *Graham v. West Virginia*, 224 U.S. 616 (1912)]; and may allow an indeterminate sentencing procedure granting executive officers a deciding voice in the ultimate sentence imposed upon any criminal defendant [*Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)].

What is due process? Without resorting to linguistic jousting, due process means fair play and substantial justice. Can it be said that the criminal defendant who has been afforded more than one opportunity to defend upon the charge of which he is accused, who is provided innumerable remedies for any alleged impropriety in the verdict of guilty or imposition of sentence, who can attack both the conviction and the sentence in both state and federal courts, who receives technical assistance of a lawyer absent express waiver in each of these proceedings and who, at least in a re-trial has been found guilty not once but at least twice and perhaps more, has been treated unfairly because, as is the case in Kansas [See K.S.A. 62-1601, 1602; *State v. McCord*, 8 Kan. 232, 242-244 (1871)] at each of his re-trials or resentencing procedures, the entire relevant proceeding commences anew, including the possibility that the sentence will be greater, if justified? Is such a criminal defendant, who is sentenced to greater punishment after the second or subsequent re-trial, after being given the opportunities required by due process, suddenly treated unfairly solely because of the greater punishment, if the greater punishment is justified under normal sentencing procedures?

An example occurring recently in Kansas we think illustrates the soundness of a negative answer to the previous questions. A criminal defendant pled guilty to a forgery charge in the Kansas state court, and upon introduction of proper evidence, was sentenced under the Kansas Habitual Criminal Act, K.S.A. 21-107 (a), as a third felony offender. The Kansas statute provides a minimum sentence of fifteen years and a maximum sentence of life imprisonment for third felony offenders. The Kansas trial judge sentenced this criminal defendant to the minimum term of fifteen years. In a federal habeas corpus proceeding, the defendant attacked only one of the prior convictions as being invalid. He did not attack the validity of his guilty plea. After hearing, the federal court sustained his position that the one prior conviction was invalid. Kansas procedure provides that if a portion of a sentence is void, the remainder of the sentence is valid and the prisoner may be resentenced. *State v. Fountaine*, 199 Kan. 434, 436-7, 430 P.2d 234 (1967); *State v. Bridges*, 197 Kan. 704, 706, 421 P.2d 45 (1966). Pursuant to normal procedure, the defendant was remanded to the custody of the state with an order that he be resentenced by the state trial court properly, or if that were not done, that he be released. See *Wynn v. Page*, 369 F.2d 930, 933 (10th Cir. 1966). In this particular case, the defendant will be returned to the state court, will be sentenced on his original plea of guilty with the enhancement of penalty provided by the other, unattacked, and still valid prior felony conviction. The defendant will be sentenced as a second felony offender under the Kansas recidivist statute which provides a minimum sentence of double the sentence of the principal charge. The Kansas court has no discretion in the imposition of this minimum sentence. *State v. Tague*, 188 Kan. 462, 466, 363 P.2d 454 (1961).

In this particular case, the imposition of the minimum second felony sentence will be ten to twenty years, a sentence that is greater than the fifteen year sentence originally imposed under the third felony offender provision of the recidivist statute. We have a situation where a mandatory resentence greater than the original sentence will be imposed. There will be no discretion involved on the part of the sentencing judge, and there will be no possibility that the greater sentence can be called punishment for success. Has this defendant been denied due process? He received exactly the same treatment in the second sentencing procedure that every other defendant sentenced as a second felony offender would receive. He has received the opportunity to, with the assistance of counsel, have the original charge tried to a jury. He has had an opportunity procedurally to require the state to procedurally prove the existence of the prior felony conviction upon which he will now be sentenced. He has had an opportunity to attack his entire criminal proceeding in both the state and federal courts. He has been successful, in part, in the federal court in having one prior conviction declared void for constitutional reasons. And yet, he will be sentenced to a greater period of time than he was originally. The only alternative to prevent greater punishment in this particular case is to treat the defendant extra-specially or extra fairly. There is no requirement of the federal constitution that this be done.

If the defendant receives the benefit of a maximum limitation on his sentence, then the state should receive the benefit of the minimum limitation on the sentence. This result requires the conclusion that the sentence imposed will be the only sentence that can be imposed anytime concerning this particular criminal defendant and his charge. Few, including the defendant, would disagree

with the proposition that upon resentencing the court might want to take into account new factors indicating that a reduction in the sentence were permissible. And, of course, the criminal defendant recognizes the possibility that the sentence may be less when he pursues appeal or post-conviction remedies. It would seem that treating the parties fairly would require the same standard of limitation applying to both, as opposed to the limitation on one side of the coin only.

(c) Equal Protection.

Those who support the absolute prohibition against greater sentencing on re-trial or resentencing contend that it violates the equal protection clause of the Fourteenth Amendment. See *Patton v. North Carolina*, *supra*, pp. 641-643. What does equal protection mean? It simply means that everyone should be treated alike by the law unless there is some reasonable classification established requiring different treatment. A class described by race, right handedness, indigence, or some other factor equally irrelevant to the penalty, if there is one, is such an arbitrary classification. The true test of equal protection is whether or not all defendants in a particular class, such as habitual criminals, as well as those who are retired or resentenced, are subject to the same procedure. There is no contention that in this case, or in the normal re-trial or resentencing case, that is not true. Further, greater sentence on resentencing if not accomplished for punitive purposes but for the purpose of imposing a "proper" sentence, bears a reasonable relationship to the fair administration of criminal justice. It is difficult, therefore, to see how such a classification concerning criminal defendants who appeal or attack their convictions, can be classified as arbitrary or unreasonable.

The proponents of the limitation on greater resentencing argue that since those criminals who do not attack their convictions do not face possibility of greater resentence by virtue of state statutes prohibiting sentence increase after incarceration, to deprive the attacking criminals of this statutory prohibition violates equal protection. Of course, interpretation of the respective state statutes is in the first instance a matter of state law. But, conclusion loses much of its vitality when we realize that implicit in the state statute is the requirement that the conviction to which it applies is the *valid conviction*. An invalid conviction is regarded as void or never validly existing. How can a state statute such as this apply to an invalid sentence?

We believe a much more sound equal protection argument supports allowance of greater sentence on resentencing. Either by statutory prescription or practice a set of criteria are used by a state trial judge wherever he imposes sentence. The criteria for proper sentencing are used in each case, including resentences. If this normal procedure is not followed in resentencing some will not receive *equal treatment*. They will be given the advantage of a special set of criteria upon which sentence will be imposed. This is not equal protection.

Referring to the Kansas example noted previously, the criminal defendant in that case was treated absolutely equally with all other criminal defendants who are sentenced under the second felony recidivist provision of the statute. As a matter of fact, he was treated *exactly the same*. Is this a denial of equal protection?

Equality could mean every criminal defendant would receive exactly the same sentence. Each criminal defendant would be *equally protected* if everyone convicted of felony were executed. There is more to equal protection than mere equal treatment in every single case.

Viewing the equal protection argument propounded in *Patton* in a different light, we again note its infirmities. A criminal inmate in Kansas cannot have his sentence reduced solely on the initiative of the trial court more than four months following its imposition. K.S.A. 62-2239. If equal protection requires establishment of a maximum sentence—the first sentence imposed—on the ground that otherwise the criminal would be denied equal application of the state statute prohibiting sentence increases on valid sentences, like reasoning would make the first sentence the minimum sentence on resentencing because to do otherwise would deny equal application of the prohibition against court reduction of valid sentences under statutes like K.S.A. 62-2239. If the criminal on resentencing can claim the benefit of sentence reduction, he should be subject to a greater sentence where proper. The true question in every case is not whether the sentence is high, low, greater, or lower, but whether it is *justified*.

This Court's language in *Palko v. Connecticut, supra*, concerning a different subject, is appropriate at this point.

"A reciprocal privilege [that of allowing the state to appeal the judgment of acquittal, obtain reversal, and thereafter retry the criminal defendant], subject at all times to the discretion of the presiding judge . . . has now been granted the state. There is here no seismic innovation. The edifice of justice stands, in its symmetry, to many, greater than before." l.c. 328.

IV. Special Situations Illustrating Why the Rule Allowing Greater Sentencing on Resentencing Is Proper.

The case presently before the Court concerns specifically the situation involving a subsequent jury trial and punishment following a second conviction of guilt on the same charge. Because the blanket rule prohibiting

greater sentence on any resentencing affects other situations in which the defendant is resentenced arising in different procedures, we invite consideration of several problems that have faced, and will continue to face the state prosecutor and judge in relation to the greater sentencing problem.

If the criminal defendant has pled guilty to a crime, or has through the use of "plea-bargaining" secured the advantage of reduction of charges, or agreement not to proceed under the habitual criminal act, he has created a situation where either implicitly or explicitly he believes, and it is commonly the case, that his sentence will not be as great as it might have been otherwise, assuming there is any judicial discretion involved. If there were a blanket prohibition against greater punishment on resentencing, it is obvious that the intelligent criminal defendant, or experienced criminal defendant, might be able to have his cake and eat it too. The defendant would enter a plea of guilty in the hopes that the sentence would be not as great as it could be under the statute, or that some other action alleviating the seriousness of the charge be taken by the prosecution. If subsequently, with the lighter sentence in existence, the criminal defendant were able to have the plea of guilty set aside and force a trial on the merits of the original cause, and at the same time retain the benefits of his bargaining with the prosecution or the benefits of the plea of guilty, the result surely would not be fair to the state.

Or, assume a situation where a criminal defendant is convicted or pleads guilty to more than one count of the indictment and is sentenced on each charge, the sentences to run concurrently. Assume further that the criminal defendant has a long record of past confrontations with the law, including numerous felony convictions, and that

therefore, because the greater sentence is asked for, and deserved in view of the trial judge, that defendant is sentenced under a recidivist statute. Because of the significant changes that have occurred in the past five years in the administration of criminal justice many state prosecutors who were doing what was constitutionally permissible several years ago are finding, after the fact, that although the action they took was proper at the time it was taken, it has now become improper. This has created sentencing problems. The most common example is that involving the right to counsel. The requirement that each criminal defendant either have retained or appointed counsel or expressly waive that right exists today [*Gideon v. Wainright*, 372 U.S. 335, 345 (1963)] and when pronounced had the effect of invalidating a number of convictions obtained prior to its pronouncement which were proper until that time [see *Betts v. Brady*, 316 U.S. 455, 473 (1942)]. In our example, let us assume that the criminal defendant is properly able to attack successfully a prior conviction used in enhancing his sentence. He is then remanded to the custody of state officials for resentencing without the use of the prior invalid felony convictions. If there had been no prior convictions in the first instance, and the defendant had merited more punishment than mere concurrent terms, the trial judge could have sentenced him to consecutive terms. The criminal defendant in our example would have deserved, and still deserves, such punishment under present punishment theories. Yet, because of a blanket prohibition against greater punishment and resentencing, the trial judge would be precluded from resentencing the defendant to consecutive terms if that sentence were slightly greater than the term imposed under the recidivist statute, even though the consecutive sentences were completely justified in this particular criminal defendant's case. Certainly, the in-

terest of society in adequately punishing those who break the law, and in protecting its citizens, has not been served by such a limitation.

There are other such examples, but we will not prolong this argument by enumerating each. We believe these few illustrate why greater sentencing on resentencing should be permitted.

CONCLUSION

The sentencing procedure, unlike the procedure involved in determining guilt, has traditionally been considered differently through the eyes of constitutional propriety. Modern theories of sentencing punishment procedure which emphasize the individualness of each case and the flexibility in designing a punishment for each specific case based on the facts of that case, require, we believe, the conclusion that greater punishment upon re-trial or resentencing is not *per se* improper. Conceding that greater sentencing on re-trial or resentencing is improper when utilized solely for punitive purposes, we believe that just as the criminal defendant may receive the benefit of his individualized attention for punishment purposes allowing a reduction of the sentence, he should suffer, if it is justified, the burden of greater sentencing where "proper." Only in such a situation will the sword of justice indeed be two-edged.

Respectfully submitted,

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